No. 9531

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EARL CANNING,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States for the District of Arizona

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In presenting this reply brief in answer to the brief of appellee counsel have no desire to again discuss or argue the questions presented in appellant's brief, but it is felt that in justice to appellant and to the Court some of the things mentioned in the argument in appellee's brief should be answered. In presenting the argument we will discuss the questions in the order presented in appellee's brief.

ARGUMENT

I.

(Appellee's Brief, 2, 3.)

Appellee states in the discussion of this phase of the argument in appellant's brief, that the indictment was sufficient and should be held sufficient on the authority of certain cases decided by the Federal District Court, which cases are cited by appellee in its brief.

Appellant, in reply to these statements, only desires to call the Court's attention to the cases cited by appellee, and respectfully asks the Court to read each of these cases. In doing so the Court will find that in every instance the indictment, while charging that the defendants agreed that they would do certain things, went farther and alleged that the defendants did do the things which the indictment charges they agreed they would do. In that respect the indictments approved in the cases cited by appellee differ radically from the indictment in the case at bar. The complaint made by appellant is that, under the bare allegation that defendants agreed they would do certain things, proof was permitted without any charge in the indictment that defendants did do the things charged in the indictment they argeed they would do. It is the contention of the appellant that, as set forth in his brief, the indictment was fatally defective, and it is respectfully submitted that the cases cited by appellee furnish sufficient authority for appellant's position in this respect.

II.

(Appellee's Brief, 4, 5, 6, 7.)

In reply to appellee's discussion of this question pre-

sented by appellee's brief, counsel wishes to state that they have no quarrel with counsel for appellee as to the law relative to the Court granting a Bill of Particulars. It is conceded that it is within the sound discretion of the trial court, but appellant contends that the trial court abused that sound judicial discretion in not requiring the Government to furnish an additional Bill of Particulars upon the request of this appellant. Appellee tries to answer the objection of appellant by taking the position that it was, as charged, appellant's duty to examine the records of the Corporation Commission for copies of the reports and statements filed with the Commission, including copies of the reports furnished Dunnes' Insurance Reports, and then reveals the whole situation to which appellant objected and about which appellant asked further information when appellee states:

> "As a matter of fact, there was no direct evidence at the trial that appellant, or any of the defendants, directly furnished Dunne's Insurance Reports with any financial statements. The statement contained in Dunne's Insurance Reports evidently was based on statements filed with the Arizona Corporation Commission."

If that is true, and it must be conceded to be true, then there was no way for this appellant to ascertain from the Corporation Commission anything relative to what was contained in Dunne's Insurance Reports, and appellant had no information whatever as to how to proceed in defending against the particular charge.

Appellee argues that appellant was bookkeeper and auditor for the corporations involved and, in addition, he

was temporary receiver for the State Securities Corporation; that all of the books of account which were introduced in evidence were brought into court on subpoena issued to the receiver of said State Securities Corporation, Mr. H. T. Cuthbert, and the office of the Corporation Commission of the State of Arizona. It must be remembered, however, that appellant was succeeded as such receiver by Mr. H. T. Cuthbert on March 28, 1938, nearly a year and a half before the indictment in this case was returned. (RT 277) At the time appellant had the books and records in his possession as such receiver he had no knowledge or information that an indictment would be returned against him in connection with any of the transactions which he had with either of the corporations.

While counsel for appellant are well aware that they are not entitled to have the Government go into minute details of evidence in presenting a bill of particulars, yet appellant is entitled to know in general the things which he must defend against and have such information relative thereto as is necessary for him to prepare and present his defense. The failure of the trial court to order an additional Bill of Particulars in the instant case, appellant contends, was an abuse of judicial discretion.

III.

(Appellee's Brief, 7, 8, 9, 10.)

Counsel for appellee apparently confuses the rule of law as to proof of the entering into the conspiracy with the proof of overt acts necessary to make such conspiracy a criminal offense.

Counsel for appellant contend that there is no evidence in the record which by any construction can be said to prove or tend to prove that appellant entered into any conspiracy with any person. Until that fact is proven the acts and declarations of alleged co-conspirators in furtherance of the conspiracy are not admissible against appellant.

Again the cases cited by appellee under this argument are exactly what appellant contends. However, appellee goes farther in its effort to bolster up its case against the appellant and cites to the Court testimony which the appellee contends prove the existence of the conspiracy. Let us look at that testimony and see how nearly appellee's statement of the testimony is correct.

Appellee calls the Court's attention to the testimony (TR 346) where Gertrude Conway states that she was employed by the companies until the first of January, 1937, and that appellant kept the books for the State Securities Corporation during all the time she was there. Now let us look at the testimony of the appellant, which was never contradicted or denied (TR 743, 744) where we find this testimony:

> "I did not open up the books for the State Securities, I kept the books but I did not open them up. During the time the records of the State Securities Corporation were kept. I was in charge of keeping books and records, the ones introduced in evidence here." (743)

> "The general ledger and cash book were discontinued in 1933 for the State Securities Corporation.

> After that we took the checks as issued and the deposits as put in the bank and the money as received and noted them down on work papers and determined the condition of the company that way." (744)

Appellee says that appellant kept the ledger of the Union Reserve Life Insurance Company and did most of the work in the insurance company's office. (TR 286)

The testimony of Ora T. Hill is that she went to work for the life insurance company in 1929 and stayed with the company until March, 1938; that she kept the books until about December, 1933; that King Wilson kept the books after that until he left, and after he left she helped with it. (TR 286). King Wilson's testimony (TR 262) is that he stayed with the company until June 15, 1937 and that he made all entries in the books until June 15, when he left; that during the time he was there he does not know of anyone else making any entries in the books except that Mr. Canning, as accountant for the company, made the closing entries. Again Ora T. Hill says (TR 286) that after King Wilson left she kept the cash book and that Mr. Canning kept the ledger of the Union Reserve Life Insurance Company, which, under the testimony, was the period from June 15, 1937 to about January 1, 1938.

We respectfully submit that the construction placed upon all of this testimony by appellee is not justified by the testimony and that the court should have sustained the objection of the appellant to the introduction of acts and declarations of alleged co-conspirators, be-

cause no proof of any conspiracy had been made by the Government in so far as appellant was concerned.

IV.

(Appellee's Brief, 10, 11, 12.)

It is, of course, appellant's contention that the rule as laid down by Corpus Juris, and quoted in appellant's brief (49) is the proper rule for the establishment of the competency of books and records and that, in so far as Section 695, Title 28, USCA, changed the rule, that section is unconstitutional.

Counsel for appellant has evidently overlooked the objections made to the introduction of the exhibits, because counsel says in its brief (11):

> "The only objection made to the introduction of these exhibits was that they were incompetent and immaterial."

It will be found that throughout all of the objections that the objection was made that the exhibits were hearsay; that certain of them were not within the issues as defined by either the indictment or bill of particulars; that if admitted the exhibits should be limited to certain defendants (TR 246, 247); that certain portions of exhibits had not been properly identified (TR 250); that Exhibit 12 (TR 265) was inadmissible against this defendant because there was no showing that he had anything to do with the bookkeeping system of the company; that as to Canning it was pure hearsay; that it had not been shown that the entries were original entries, or the first permanent entries of the transaction;

that there was no attempt to produce persons who made the original entries or persons having knowledge of the facts; that said entries were not corroborated by any person having personal knowledge of the facts; that there was no showing that such persons were dead, insane or beyond reach of process. A further exception was made to the exhibit on the ground that it was introduced under Section 695, Title 28, USCA, and that said act was unconstitutional because it shifted the burden of proof from the Government to the defendant; that said act was unconstitutional and void in that it violates the Sixth Amendment to the Constitution of the United States and deprives the defendant of the right to be confronted with the witness against him, and that no opportunity had been afforded to cross examine the persons who are familiar with the accounts and transactions or who made the original entries; that said document was pure hearsay as to appellant; that there was no showing that the document had been made in the regular course of business of the company; that said document is not the best evidence; is hearsay, and is irrelevant, incompetent and immaterial.

Certainly then counsel for appellee is mistaken when the statement is made that the only objection made to the exhibits was that they were incompetent and immaterial.

V.

(Appellee's Brief, 12, 13)

It is not easy to understand how appellee can make the statement in his answer to the fifth contention of appellant's argument, that appellant cited no authorities

sustaining his claim that the court erred in refusing to keep the Government's witness, King Wilson, in attendance upon the court. In this connection the Court's attention is respectfully called to appellant's brief, pages 54, 55, 56, 57, 58. It certainly seems that appellee is begging the question when counsel for appellee knows that an attempt was made on cross-examination to question the witness relative to information in some of the books which had not yet been introduced and offered in evidence, and counsel for appellee objected because the books had not been introduced in evidence. With this full knowledge, counsel for appellee states:

> "Any questions which it would have been proper to have asked the witness Wilson at any time during the trial could have been asked him at the close of his direct examination."

The two positions taken by counsel for appellee are so inconsistent that query might well be made, if counsel for appellee makes his own law as he proceeds to meet the exigencies of his acts?

It is the contention of appellant that in so far as cross-examination of witnesses by a defendant is concerned in criminal cases, the court has no discretion to refuse or not refuse permission to cross-examine, because the right to be confronted with a witness and cross-examine him is an absolute right, and the authorities for this statement are set forth in appellant's brief.

VI.

(Appellee's Brief, 13, 14)

Appellee attempts to justify the action of the court in receiving as rebuttal the testimony of E. P. Hair concerning transactions between the corporations and J. Elmer Johnson, and proceeds on the theory that the testimony would have been admissible in the case in chief and, hence, was admissible as rebuttal testimony, even though it had no tendency to rebut any testimony which had been presented by the defendants. J. Elmer Johnson had not been a witness, no grounds for impeachment had been laid as to any witness, and clearly would not have been admissible in the case in chief. An objection was made to the introduction of this testimony on all of these grounds (TR 881-895).

The plain purpose of the offer of this testimony by the Government was to prejudice the jury against the defendants, and the Court should have sustained the objection.

VII.

(Appellee's Brief 14, 15)

In reply to this argument on behalf of appellee, appellant directs the Court's attention to the whole case and submits that with all of the evidence there is no competent evidence to sustain a verdict against this appellant.

Appellee apparently seeks to convey to the mind of the Court that the only motion for a directed verdict was the motion made on behalf of appellant at the close

of the Government's case, and appellee states in its argument that this motion was waived by the introduction of evidence in behalf of appellant. The record shows, however, that after the entire evidence in the case was received and both appellee and appellant had rested, counsel for appellant again moved the court for a directed verdict and urged all of the grounds set up in the first motion for a directed verdict at the close of the Government's case and additional grounds set out in the motion (RT 899-903).

It, of course, is possible in any case to select isolated questions and answers without any further explanation, and on these isolated questions and answers, without regard to anything else, say that a defendant was properly convicted. We respectfully submit, however, that an examination of the entire record will show that the motion for a directed verdict should have been granted.

VIII.

(Appellee's Brief, 15, 16, 17, 18, 19).

In answering this portion of appellant's argument appellee tries to dismiss the error complained of by ignoring the questions presented by appellant. Appellant does not desire to enter into a lengthy discussion in this reply brief as to the assignments of error covering the instructions given by the court. Appellant only desires to call the Court's attention to the instructions and request that the Court examine said instructions in the light of the objections made thereto (TR 903-962).

IX.

(Appellee's Brief, 19)

In reply to this answer of appellee to appellant's brief, it is not deemed necessary to discuss again the reasons why the court should have stricken from the testimony the exhibits admitted in evidence on behalf of the Government. That question was fully covered in appellant's brief in discussing the error of the court in overruling the objections made by appellant to the introduction of said exhibits at the time they were received in evidence, for all of which reasons appellant contends the exhibits should have been stricken.

CONCLUSION

It is respectfully submitted that in view of the errors complained of, and the law relative thereto, and the brief of appellee, this Court should reverse the conviction of appellant and remand the case with directions to the United States District Attorney to dismiss the indictment and order the release of the appellant Earl Canning.

Respectfully submitted,

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